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Nos. 93-356 and 93-521

In the Supreme Court of the United States

OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS CORPORATION, PETITIONER

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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1. *AT&T reads "any" out of Section 203(b)(2).* Section 203(a) of the Communications Act requires telephone companies to file tariffs, but Section 203(b)(2) authorizes the FCC to "modify any requirement" of Section 203. AT&T nevertheless contends that the FCC lacks authority to alter the tariff-filing requirement. AT&T has failed to explain how its contention may be

reconciled with the language of the statute since, under its construction of Section 203(b)(2), the FCC may not modify "any" requirement of Section 203.

AT&T states (Br. 24) that, "[c]ontrary to the FCC's claim," AT&T's reading of the statute "give[s] full effect to Section 203(b)(2)'s provision that the FCC may 'modify *any* requirement of [Section 203].'" However, almost immediately after recognizing that the statute authorizes the Commission to modify *any* requirement of Section 203, AT&T states (Br. 25) that the FCC may *not* "exempt carriers from the requirements that they publish and file 'all' their rates, and charge only those rates that have been filed." In fact, under AT&T's interpretation of Section 203(b)(2), all the FCC may do is modify matters such as "the form and content of rate schedules" and "the jurisdiction where [tariffs] are filed." Br. 24.[1] In short, under AT&T's construction of Section 203(b)(2), the Commission may not modify the requirement that long distance telephone companies file tariffs. AT&T's proposed construction therefore reads "any" out of the statute.

2. *The analogous provision of the Interstate Commerce Act supports the FCC's construction of the Communications Act.* AT&T's failure to give effect to the word "any" also infects its discussion of the Interstate Commerce Act. That Act does not authorize, and has never authorized, the ICC to modify "any" requirement

[1] Although AT&T suggests in this Court (Br. 24) that the Commission has significant flexibility with regard to tariffs under its reading of Section 203(b)(2), AT&T simultaneously has argued in the D.C. Circuit that the Commission may not authorize non-dominant carriers to file tariffs specifying a "range of rates." Joint Br. of Petitioners AT&T *et al.* at 17-32, *Southwestern Bell Corp.* v. *FCC*, appeal pending, No. 93-1562 (to be argued May 20, 1994).

of the analogous provisions of the Interstate Commerce Act. Rather, 49 U.S.C. 10762(d)(1) authorizes the ICC to "change the other requirements of this section." While that language would be susceptible to a broad interpretation, it is not as broad as the language of the Communications Act since the ICC is not authorized to modify "any" requirement. Thus, whatever the extent of the ICC's modification authority, the FCC has greater authority.

AT&T's discussion of the history of the analogous ICC provision (Br. 25-29) does not support its narrow construction of Section 203(b)(2) of the Communications Act, but instead supports our construction of that provision. The analogous provision of the Interstate Commerce Act (former 49 U.S.C. 6(3) (1976)) authorized the ICC to "modify the requirements of this section in respect to publishing, posting, and filing of tariffs." In 1978, Congress amended the Interstate Commerce Act to provide that the ICC may "change the other requirements of this section." At that time, Congress said that it was not "making a substantive change" in the Interstate Commerce Act. Act of Oct. 17, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1466. Contrary to the conclusion AT&T draws from that history, it shows that Congress did not view "modify" as having a restricted meaning. Congress replaced "modify" with "change" in 1978, and said that it was not altering the substance of the Interstate Commerce Act. If Section 203(b)(2) of the Communications Act provided that the FCC may "change any requirement" of Section 203, there would be no basis at all for the D.C. Circuit's conclusion that the FCC's authority should be limited to making "circumscribed alterations." 93-356 Pet. App. 53a, quoting *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985). Yet Congress in 1978 apparently did not think

"modify" meant "to make minor changes in" (*Webster's Ninth New Collegiate Dictionary* 763 (1986)), since it considered "modify" to be the equivalent of "change." Thus, contrary to AT&T's contention, the 1978 amendment to the Interstate Commerce Act supports our conclusion that "modify" should be given the alternative meaning provided in *Webster's*—"to make basic or fundamental changes in often to give a new orientation to or to serve a new end." *Ibid.*

3. *"Modify" encompasses either minor or fundamental changes.* AT&T erroneously states (Br. 17) that we "concede that the ordinary meaning of 'modify' is * * * 'make minor changes in.'" We make no such concession. Rather, we acknowledge that "modify," standing alone, may have either meaning given in *Webster's*, but when read with the word "any," "modify" should be given the broader meaning in Section 203(b)(2). That is, if relieving some telephone companies of the requirement that they file tariffs is not thought to be a minor change, then the FCC is authorized to make major changes since the Commission may alter "any" requirement of Section 203.

AT&T also challenges (Br. 17) our reliance on *Webster's Ninth New Collegiate Dictionary*. Twice last Term, however, this Court relied on that dictionary to elucidate the meaning of an ambiguous term. *Good Samaritan Hospital* v. *Shalala*, 113 S. Ct. 2151, 2158 (1993); *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 113 S. Ct. 1489, 1494-1495 (1993). Moreover, other dictionaries provide similarly broad definitions. One of the definitions of "modify" in *Webster's Third New International Dictionary* 1452 (1986) is "to make a basic or important change in; alter." This Court has relied on that dictionary even more recently than on *Webster's Ninth New Collegiate Dictionary*. *National Organization for Women, Inc.* v. *Scheidler*, 114 S. Ct. 798, 804 (1994). Other commonly used dictionaries are more general. For example, *The American Heritage Dictionary of the English Language* 1161 (3d ed. 1992) defines "modify" as "[t]o change in form or character; alter." The Commission's interpretation is entirely consistent with that definition, which does not specify the extent of the change or alteration.

Contrary to AT&T's apparent suggestion (Br. 18), there is no basis on which to conclude that "modify" has changed in meaning since 1934. The dictionaries from the 1930s that AT&T cites define "modify" as meaning "[t]o change somewhat in form or qualities." AT&T Br. 18 n.22. That shows that "modify" means to "change," which, as we have explained, supports our construction of the statute. That conclusion is not altered by the fact that the definitions from the 1930s say to change *somewhat*. That begs the question, since "somewhat" means "in some degree or measure." *Webster's Ninth New Collegiate Dictionary* 1124 (1986). Thus, the amount of "change" resulting from a modification, under the definitions from the 1930s that AT&T cites, is indefinite. The Ninth edition of *Webster's* merely elaborates on the definitions that were common in the 1930s by stating that the change may be either fundamental or minor.

Nor is there merit to AT&T's claim (Br. 19) that Congress would have used the word "exempt" rather than "modify" if it had meant to authorize the FCC to allow telephone companies lacking market power to offer service without filing tariffs. The modification power under Section 203(b)(2) applies to each of the requirements of Section 203, and "modify" better fits all of the provisions of Section 203 than would "exempt." In particular, by giving the Commission authority to "modify" the requirements of Section 203, Congress granted the power to increase the extent of regulation as well as the

power to exempt companies from regulation. "Modify" is thus a more appropriate word for granting the FCC broad authority to adjust the requirements of Section 203.

AT&T also errs by claiming (Br. 26-27) that its reading of "modify" finds support in the Motor Carrier Act of 1935. Motor common carriers were governed by former 49 U.S.C. 317 (1976): former Section 317(a) required common carriers to file tariffs, former Section 317(b) required common carriers to follow the tariffs they had filed, and former Section 317(c) authorized the ICC to "modify the requirements of this section." Former 49 U.S.C. 318 (1976), which governed motor contract carriers, was drafted differently in many respects. Former Section 318(a) first established a tariff-filing requirement that was followed by a long proviso stating, among many other qualifications, that the ICC was authorized to "modify the requirements of this paragraph." Former Section 318(a) then set out the requirement that contract carriers must follow the tariffs they file, followed by a proviso authorizing contract carriers to "apply to the Commission for relief from the provisions of this paragraph." Contrary to AT&T's claim (Br. 27), this is not a "legislative recognition that the 'modification' authority does not allow exemptions from rate filing requirements." Both former Section 317 and former Section 318 authorized the ICC to "modify" the tariff-filing requirements they established.[2]

[2] Nor is AT&T's position supported by 49 U.S.C. App. 1386(b)(1), which authorized the Civil Aeronautics Board (CAB) to "exempt from the requirements of this subchapter * * * any person or class of persons." AT&T claims (Br. 27 n.39) that Section 1386(b)(1) shows that Congress thought that the CAB's authority to modify the tariff-filing requirement was "insufficient to accomplish detariffing." But the authority to modify the tariff-filing requirement was set out in former 49 U.S.C. 1373(c) (1976), and Section 1386(b)(1) reached far more than that Section—it authorized exemptions from "this subchapter." Section 1386(b)(1) accordingly sheds little light on the interpretation of former Section 1373(c). It says nothing about the meaning of "modify" in Section 203(b)(2) of the Communications Act.

AT&T has failed to respond to our argument (opening brief at 19-20) that the FCC's permissive detariffing policy, as applied, is a modification of the tariff-filing requirement even if "modify" is construed narrowly. The FCC has hardly abolished the tariff-filing requirement, which still applies to all international carriers, to almost all local exchange carriers providing interstate access services, and to AT&T, which has 60 percent of the domestic long distance market. The Commission has lifted the obligation to file tariffs in a portion (40 percent) of one of three markets. Even in that portion, some carriers desire to file tariffs in some circumstances, as demonstrated by MCI's opposition to the Commission's "mandatory detariffing" policy. See *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186 (D.C. Cir. 1985). If "modify" is given a limited reading, the statute nonetheless allows the FCC to take the limited step of partial detariffing.

4. *Section 203(c) shows that Congress contemplated modification of the tariff-filing requirement.* As stated in our opening brief (at 20-22), the Commission's reading of the statute is supported by Section 203(c), which provides that, "unless otherwise provided by or under authority of this chapter," no carrier shall provide service "unless schedules have been filed." That shows that the Commission has "authority" to relieve telephone companies of the requirement that they file "schedules." AT&T has advanced no reason why Section 203(c) should

not be read to refer to Section 203(b)(2), which in our view authorizes the Commission to modify Section 203(a)'s requirement that telephone companies file "schedules showing all charges."

AT&T merely lists (Br. 20 n.26) four other provisions that were enacted in 1934 that arguably authorize untariffed service. Two of those provisions (47 U.S.C. 201(b) and 211) refer to "contracts" that must be filed rather than "schedules" or "tariffs" that must be filed. Another provision (47 U.S.C. 205 (1988 & Supp. III 1991)) provides that the Commission may prescribe rates if it determines that a carrier's rates are unreasonable. The final provision (47 U.S.C. 210) merely allows telephone companies to provide free service to employees. The proviso in Section 203(c) contemplating service in the absence of a tariff where detariffed service has been authorized by the Commission is much more clearly a reference to Section 203(b)(2) than to any of the provisions AT&T cites.

5. *AT&T's interpretation of the statute is not compelled by other provisions of the Communications Act.* AT&T contends (Br. 21) that "the FCC is nullifying" 47 U.S.C. 204, which authorizes the suspension of a filed rate before it takes effect, and 47 U.S.C. 415, the limitation of actions provision. That is not so. Those provisions are in effect and apply to the many carriers that must file tariffs or choose to do so. Of course, Sections 204 and 415 would not apply to non-dominant carriers that choose not to file tariffs under the permissive detariffing policy. But it is hardly surprising that a modification of one statutory provision has effects on other provisions.

Contrary to AT&T's assertion (Br. 21), the permissive detariffing policy does not "authoriz[e] the discrimination and preferences that are barred" by 47 U.S.C. 202(a).

Rather, the Commission has made clear that those provisions continue to apply to all carriers, whether or not they are required to file tariffs. *Report and Order*, 7 F.C.C. Rcd. 8072, 8079 (1992). At the same time, the Commission determined that, because of their lack of market power, telephone companies subject to competition are unlikely to be able to discriminate unreasonably in violation of Section 202(a). See *Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C.2d 308, 334-338 (1979). AT&T's claim that tariffs are essential to proving discrimination claims is contrary to experience in, for example, cases arising in the employment discrimination context. Employers do not publish tariffs describing all of their hiring decisions in detail, but plaintiffs nevertheless bring suit and, through discovery, develop evidence to support their claims. If there is reason to think that a telephone company is discriminating unreasonably, a plaintiff may bring a comparable action in the absence of tariffs.

AT&T's prior position on this point—which goes to the reasonableness of the policy rather than to the statutory construction issue—is more accurate than its current position. In 1985, the Commission noted that AT&T had stated that the assertion "that the continued filing of tariffs will aid in the prevention of anti-competitive price discrimination was without merit and demonstrated a fundamental misunderstanding of the competitive process." *Sixth Report and Order*, 99 F.C.C.2d 1020, 1027, vacated and remanded, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). The Commission agreed with AT&T and added: "The simple answer to this contention, AT&T asserted, is that a non-dominant carrier, by definition does not have 'sufficient market power to be able to engage in improper price

discrimination without suffering the discipline of the marketplace.'" *Ibid.*, quoting AT&T comments.

Congress agrees that the tariff-filing requirement is not necessary to implement the prohibitions on unreasonable and discriminatory rates. In 47 U.S.C. 332(c)(1)(A), as amended in 1993 (see Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(b)(2)(A)(iii), 107 Stat. 393), Congress authorized the Commission to relieve commercial mobile carriers from the tariff-filing requirement, while simultaneously prohibiting the Commission from relieving such carriers from the requirement that rates be reasonable and nondiscriminatory. See also H.R. Rep. No. 111, 103d Cong., 1st Sess. 260 (1993).

6. *AT&T's reliance on Maislin is misplaced.* AT&T argues at length (Br. 29-41) that the permissive detariffing rule conflicts with the "filed rate doctrine," as applied in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990). AT&T errs, largely for reasons already discussed. It claims that the language of Section 203(b)(2) was taken "virtually verbatim" from former Section 6(3) of the Interstate Commerce Act (Br. 38), that we "have not identified—and cannot identify—a single difference that is relevant to the issue before the Court" (Br. 39), and that "the rate filing provisions of the ICA were identical in all material respects to those of the Communications Act *prior* to 1978" (Br. 40). To the contrary, Section 203(b)(2) authorizes the FCC to modify "any" requirement of Section 203, and the analogous provision of the Interstate Commerce Act does not authorize, and never has authorized, the modification of "any" requirement.[3] As we have explained, AT&T's position—that the Commission may not modify the tariff-filing requirement—cannot be squared with the language Congress enacted in the Communications Act.

[3] The Second Circuit, referring explicitly to the FCC's authority under Section 203(b)(2), has held that "the congressional intent was not to provide a carbon copy of the Interstate Commerce Act." *AT&T* v. *FCC*, 503 F.2d 612, 616 (1974).

In addition, AT&T's reliance on *Maislin* and on the similarities between the two statutes is misplaced because, as amended in 1978, the Interstate Commerce Act plainly does not authorize the ICC to "modify" the requirement that carriers follow the rates they have filed. That is because the modification provision in the Interstate Commerce Act authorizes changes in the requirements of "this section" (49 U.S.C. 10762(d)(1)), and the requirement that carriers follow their filed tariffs is in a different section (49 U.S.C. 10761(a)). Accordingly, the provision of the Interstate Commerce Act that is analogous to Section 203(b)(2) was not at issue in *Maislin*. For that reason as well, *Maislin* is not instructive with respect to the proper construction of Section 203(b)(2).

AT&T also suggests (Br. 31-32) that the introduction of competition into the telephone industry does not constitute "special circumstances" under Section 203(b)(2), a position not adopted by the court of appeals. AT&T overlooks the purposes served by the permissive detariffing rule. As explained in our opening brief (at 30-34), the Commission concluded that the burdens caused by tariffs posed special problems for challengers to AT&T's long distance monopoly. The FCC instituted the permissive detariffing rule to give new entrants an incentive to offer discounts, since they would have little incentive to cut prices if AT&T, long the dominant long distance carrier, could quickly learn of the discounts by inspecting tariffs and then match them. *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445, 453-454 (1981). Permis-

sive detariffing thus addresses the special market problems presented when a long-dominant company faces competition from many smaller companies.

Furthermore, AT&T's entire discussion of the filed rate doctrine—which, in our view, is not even implicated in this case[4]—appears to be premised on the theory that it is a free-floating rule of constitutional proportion, rather than a rule developed in the context of the transportation industry. But all of the precedent on which AT&T relies developed under the Interstate Commerce Act, not the Communications Act. It should not be imported indiscriminately into this different statutory, regulatory, and economic context to strike down a sensible policy that is authorized by the terms of the Communications Act.

At the same time, AT&T errs insofar as it suggests (see, *e.g.*, Br. 35) that the tariff-filing requirement is the central provision of the Communications Act. To the contrary, whether rates are filed is not an end in itself, but merely a means to the end of ensuring reasonable, non-discriminatory rates. That is evident both as a matter of common sense and from the structure of the statute. In the statute, the substantive requirements come first—47 U.S.C. 201(a) requires telephone companies to provide service "upon reasonable request" and Section 202(a) prohibits "unreasonable discrimination." The Commission lacks authority to modify those provisions. The substantive provisions are followed by the tools for their implementation, including the tariff-filing requirement of Section 203(a) and the authority granted

[4] The classic statement of the filed rate doctrine is: "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted under any pretext." *Louisville & N.R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915).

under Section 204(a)(1), which provides that the Commission "may" investigate and "may" suspend rates. Congress gave the Commission broad discretion with respect to the tools—the Commission may "modify any requirement" of Section 203 and has unreviewable discretion with respect to whether to investigate and suspend rates under Section 204. See *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 454 (1979).

7. *Congress has accepted permissive detariffing as a premise of subsequent legislation.* As explained in more detail in our opening brief (at 22-26), Congress enacted the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) in order to require that tariffs be filed by telephone companies offering "alternative operator services" to hotels and other institutions. The amendment was needed because Congress had determined that some companies were "tak[ing] advantage of the customer's captive status" (S. Rep. No. 439, 101st Cong., 2d Sess. 2 (1990)), and Congress understood that the companies did not have to file tariffs on account of the Commission's permissive detariffing policy (*id.* at 3 & n.10). The tariffs required by TOCSIA are meant to be less burdensome than those generally required under Section 203(a) (*id.* at 23), although they would require some additional information beyond that provided by tariffs filed under Section 203(a) (see AT&T Br. in Opp. 18 n.16). In its brief on the merits, AT&T makes clear (Br. 44 n.53) that, under its reading of the Communications Act, providers of alternative operator services must file tariffs satisfying both Section 203(a) and TOCSIA. In other words, TOCSIA did not have the effect Congress intended—requiring alternative operator service providers to file streamlined tariffs—but instead imposed more burdensome requirements on those providers. Moreover, under AT&T's view, if the Commission waives

the requirement that providers of alternative operator services file tariffs, as it is expressly authorized to do (see 47 U.S.C. 226(h)(1)(B) (Supp. III 1991)), the result is that the operator service providers still would be required to file tariffs. That is neither what Congress understood nor what it intended.

Nor is there merit to AT&T's interpretation (Br. 42) of the 1993 amendment of 47 U.S.C. 332(c)(1)(A), which concerns commercial mobile carriers (such as most providers of cellular services). While amending Section 332 as part of the Omnibus Budget Reconciliation Act of 1993, Congress, aware that the D.C. Circuit had invalidated the permissive detariffing policy (H.R. Rep. No. 111, *supra*, at 260), authorized the Commission to "specify by regulation" which provisions of Title II of the Communications Act apply to commercial mobile carriers. Pub. L. No. 103-66, § 6002(b)(2)(A)(iii), 107 Stat. 393. Thus, despite the judgment below, the FCC may relieve commercial mobile carriers from the requirements of Section 203, among other provisions. AT&T contends that this Court should read Congress's failure to go further and exempt all non-dominant carriers from the tariff-filing requirement as support for its construction of Section 203(b)(2). AT&T attempts to read far too much into the subsequent legislation, and its reading turns Congress's action on its head. Congress, in effect, overturned the D.C. Circuit's decision with respect to the narrow class of carriers it was considering. Its failure to do more should not be read as an endorsement of the D.C. Circuit's decision. At the same time, Congress's amendment of Section 332(c)(1)(A) is consistent with the Commission's interpretation of Section 203(b)(2) since Section 332(c)(1)(A) authorizes the Commission to waive numerous requirements of Title II of the Communications Act with respect to

commercial mobile carriers, not just the requirements imposed by Section 203.

8. *The FCC's construction of the Communications Act is entitled to deference.* AT&T suggests (Br. 4) that this Court should not defer to the Commission's interpretation of Section 203 because the Commission said in 1980 that "the requirement that * * * all common carriers" must file tariffs is "well established." *In re Western Union Telegraph Co.*, 75 F.C.C.2d 461, 474 (1980). That is dictum, however, since the issue in that case was whether Western Union could decide unilaterally not to file a complete tariff. Moreover, the Commission noted that "[t]he drafters of Section 203 clearly intended to give the Commission broad latitude in deciding the necessity for tariff filings." *Id.* at 474 n.9.[5] And since before the break-up of the Bell System—generations ago in terms of the development of the telecommunications industry—the Commission has consistently held that it may permit non-dominant carriers not to file tariffs.

AT&T also suggests (Br. 37) that deference to the Commission's interpretation of the Communications Act is foreclosed by this Court's interpretations of the Interstate Commerce Act. Apart from the fact that this

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[5] AT&T also relies (Br. 4-5) on statements made in a brief filed on behalf of the Commission in the Second Circuit in the late 1970s. In the opposition filed by the Solicitor General in that case, however, the government made clear that the Commission, "with deliberate caution, has not yet resolved for itself whether the Communications Act would permit nonregulation." Gov't Br. in Opp. at 6, *IBM* v. *FCC*, No. 77-1540 (filed July 1978). The Solicitor General explained on that basis that certiorari was not warranted to review whether the FCC lacked authority to forbear from regulating common carriers, since the view taken by the Second Circuit in that case was "no more than dictum, not binding on the Commission or any other party." *Id.* at 7.

Court has never considered the ICC's modification authority, there is no basis for that novel suggestion, particularly since AT&T errs in claiming that there is no relevant difference between the two statutes.

The Commission's reading of Section 203(b)(2) is the better reading, since it gives effect to all of the words of the statute, including "any." But if the Commission's construction is not compelled by the language of the statute, it is at least consistent with the language of the statute, and therefore is entitled to deference.

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted

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